No. 15762

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELWARD BAKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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I.
JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California, which adjudged the appellant to be guilty of a certain count of an indictment (see Statement of Case, below), which indictment was brought under the provisions of Section 2421 of Title 18, United States Code. [R. pp. 373-374.]

The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California. [R. p. 65.]

The jurisdiction of the District Court is based upon Section 3231, of Title 18, United States Code. This

court has jurisdiction to entertain this appeal and to review the proceedings leading to said judgment by reason of the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.
STATEMENT OF THE CASE.

An indictment in one count was filed on July 3, 1957, charging the appellant essentially as follows:

On or about April 1, 1957, the appellant knowingly transported a woman, Sally Sisneros, in interstate commerce, from Phoenix, Arizona, to Los Angeles County, California, for prostitution, debauchery and other immoral purposes.

This indictment was superseded by a new indictment in two counts filed on July 24, 1957, charging the appellant essentially as follows:

Count I, on or about April 1, 1957, the appellant knowingly transported a woman, Sally Sisneros, in interstate commerce, from Phoenix, Arizona, to Los Angeles County, California, for prostitution, debauchery and other immoral purposes;

Count II, on or about April 1, 1957, the appellant knowingly transported a woman, Sally Sisneros, in interstate commerce, from Las Vegas, Nevada, to Los Angeles County, California, for prostitution, debauchery and other immoral purposes.

The defendant below pleaded not guilty to the first indictment [R. p. 9], and not guilty to both counts of the superseding indictment [R. p. 26]. On the 22nd of July, when it was learned that the government was preparing a superseding indictment, counsel for the defendant

moved for a continuance of the trial date in order to prepare against the new indictment. [R. p. 20.] Said motion was granted and the trial date continued to August 13, 1957. [R. p. 21.] On July 8, 1957, prior to the first arraignment, Mr. Benton was appointed as counsel for the defendant below. [R. p. 4.]

On July 22, 1957, Mr. Benton made a motion to be relieved as counsel, which motion was granted. [R. pp. 15-16.]

On July 29, 1957, Mr. Philip S. Schutz appeared as counsel for the defendant below. [R. p. 25.]

On August 13, 1957, Mr. Schutz asked to be relieved as counsel. [R. pp. 29-33.]

On August 15, 1957, Mr. Schutz appeared as counsel and participated in the selection of the jury. [R. pp. 62-84.]

On August 16, 1957, Mr. Benton again appeared and represented the appellant throughout the remainder of trial. [R. p. 89.] Prior to the commencement of the trial, Mr. Benton made a motion for a continuance inasmuch as he felt inadequately prepared. [R. p. 89.] This motion was denied. [R. pp. 89-94.]

Trial commenced on August 16, 1957 [R. p. 94] and resulted in a verdict of not guilty as to count one and guilty as to count two against the appellant. [R. p. 384.] Appellant had moved for a judgment of acquittal at the close of the Government's case [R. p. 324], and renewed it [R. pp. 325-326, 392], which was denied.

Judgment was entered on September 9, 1957. [R. p. 397.] Notice of appeal was filed on September 16, 1957.

III.
STATEMENT OF THE FACTS.

The record shows that while the appellant was in Phoenix, Arizona, he was, by his own admission, a hustler of girls [R. pp. 222-224] and a narcotics pusher. [R. pp. 108-109.]

The appellant met the victim at a holiday party in December of 1956. [R. p. 102.] The victim commenced living with the appellant thereafter. [R. p. 104.] The appellant induced the victim to become a prostitute for him. [R. pp. 104-116, 170-171.] The victim worked as a prostitute in the Mexican labor camps around Phoenix [R. pp. 106-115] and on the streets. [R. pp. 118-119.] While the victim was working as a prostitute she gave her earnings to the appellant. [R. pp. 112, 119, 123, 127, 247.]

The appellant took the victim from Phoenix to Las Vegas in February 1957 so that she could work in the latter city as a prostitute. [R. p. 120.]

The appellant and the victim returned to Phoenix separately but the victim again commenced working for the appellant as a prostitute. [R. p. 127.]

The appellant told the victim that they were going to leave Phoenix and go to Los Angeles and that she would work as a prostitute in Los Angeles. [R. pp. 127-128, 133.]

On March 30, 1957 they left Phoenix [R. pp. 231-232] and traveled to Las Vegas. [R. p. 129.] While they were in Las Vegas the second time, the victim worked as a prostitute. [R. p. 132.] They stayed in Las Vegas for four or five days. [R. p. 246.]

The appellant again stated that he was going to take the victim to Los Angeles and have her work as a prostitute there. [R. p. 133.] The appellant then took the victim from Las Vegas to Los Angeles. [R. p. 133.] He introduced her to some other girls upon arriving in Los Angeles [R. p. 134], one of whom was thought to be a prostitute. [R. p. 136.] The appellant and the victim lived together for several days at the Hayes Motel [R. p. 137] and the victim had sexual intercourse with the appellant and with a sailor who had been procured by the appellant and another man. [R. pp. 136-143.] This other man, known as Smitty, had been introduced to the victim by the appellant. [R. pp. 137-138.] He was supposed to show the victim places to work out of and actually did show the victim such places. [R. p. 138.] The appellant introduced the victim to another girl, Barbara Garcia, a prostitute, who was going to show the victim the streets. [R. pp. 144-146.] The victim was reluctant to work as a prostitute and did not push herself in the trade. [R. pp. 143-144.]

IV.
ARGUMENT.

The appellant contends in his opening brief and in his statement of points in the transcript of the record the issues to be:

A.
Sufficiency of the Evidence.

That the Government failed to establish the elements of the crime of which the appellant was convicted.

However, it is submitted that the elements of the alleged crime were established and that the verdict of

the jury as to count two of the indictment was a proper one.

The indictment was in two counts. Count one charged the defendant with transportation of a woman in interstate commerce for purposes of prostitution, debauchery or other immoral purposes in that he took the victim Sally Sisneros from Phoenix, Arizona, to Los Angeles County, California. Count two alleged the transportation of the victim from Las Vegas, Nevada to Los Angeles County, California for the same purposes on or about the same date April 1, 1957 [Tr. p. 393, lines 2-17.] The appellant was acquitted on count one but was convicted on count two. Therefore, as to this point, we are not here concerned with whether or not the elements of count one were established but only as to the elements of count two since that is the count upon which the appellant was convicted.

Unrebutted testimony clearly shows that the appellant was in Las Vegas, Nevada with the victim and had in his possession a particular type automobile [Tr. pp. 130-133; p. 244, lines 11-18; p. 246, lines 20-24]; that he was seen in Los Angeles County, California a few days later [Tr. p. 257, lines 3-25; p. 258, lines 1-5]; with the same automobile [Tr. pp. 267, 275, 279]; that he was the one who had actually transported the victim across the Nevada-California border [Tr. p. 133, lines 14-25; p. 134, lines 1-11]; that he had induced the victim to become a prostitute for him in Phoenix, Arizona [Tr. pp. 104-116; p. 170, lines 9-25; p. 171, lines 1-4]; that she had worked for him as a prostitute giving the monies acquired from her trade to the appellant [Tr. p. 119, lines 2-15; p. 112, lines 2-21; p. 123, lines 2-8; p. 127, lines 8-13; p. 247, lines 1-24]; that he intended to take

the victim to Los Angeles, California [Tr. p. 127, lines 14-25; p. 128, lines 1-4; p. 133, lines 1-20]; that he intended her to work as a prostitute after their arrival in Los Angeles [Tr. p. 128, lines 5-19; p. 133, lines 1-20]; that he in fact had her work as a prostitute after their arrival in Los Angeles. [Tr. starting p. 134, line 18, to p. 144, line 19; pp. 258-260.] Such evidence is sufficient upon which a jury could base a conviction for violation of 18 U. S. C. 2421.

B.
Evidence Based on Illegal Act.

That the evidence was based upon an illegal act of the Phoenix and Arizona law enforcement agencies by floating the appellant out of Phoenix and out of Arizona and that he was compelled by said officers to take with him the victim.

The Government contends that the appellant took the victim with him when he left Phoenix, Arizona of his own free will and choice and that this had been his intention prior to the date of actual leaving. At no place in the testimony of the officers, either direct or on cross-examination did they state that they ordered the appellant to leave town or the state of Arizona. The only testimony to the effect that the appellant was asked to leave town was from the victim who stated that the appellant had told her that he was told to leave the city and the state, which is only hearsay. [Tr. p. 202, lines 10-18.] The victim testified before the officers testified. Counsel for the defendant was at least aware at this stage of the trial that the defendant-appellant may have been ordered to leave the city and state. If there was real merit in

his contention, why didn't he pursue the matter further on cross-examination of the officers?

Assuming for the sake of argument that the appellant had been asked to leave town, he still had a perfect right to remain. There is prior testimony to the effect that the appellant told the victim that they were going to leave Phoenix and go to Los Angeles and that he was going to have her work as a prostitute at the latter city. This shows that he had the independent intention to go somewhere else to continue in his hustling activities.

The gist of the crime is the transportation of a woman. It is submitted that the woman who was the victim, was not forced to leave, nor was the appellant forced to take her across a state line. [Tr. p. 203, lines 9-12; p. 216, lines 11-17.] The victim testified that she wanted to go with the appellant; that she had not been forced to leave the city or state. The officers testified that when one of them went to the victim's apartment on the night that she and the appellant left town, that she had the clothes and belongings of each packed together in suitcases and was herself ready to leave town with the appellant. [Tr. p. 232, lines 5-25; p. 233, lines 1-23.] The officers testified that they had been told by the appellant on the day of his leaving Phoenix, that he was leaving town. [Tr. p. 231, lines 2-25.] Even though an officer at this point decided to see that the appellant was sincere about leaving by escorting him out of town, it seems obvious that the appellant intended to take the victim with him, else why would the victim have been in her apartment sitting on luggage which contained both the belongings of the victim and the appellant. Regardless of the actions of the officers, the appellant may have had

an independent intention to take the victim with him. The evidence was such that the jury could have so found.

There is no merit to the contention that force was the reason why the appellant took the victim from Las Vegas to Los Angeles. Assuming for the sake of argument that he was forced to leave Arizona, once beyond the borders of that State, there was no compulsion to go further. He was convicted of transporting a woman from Las Vegas to Los Angeles and he was in no way forced by any law enforcement agency to make that trip.

C.

Error of Trial Court—Denial of Continuance.

That the trial court erred in denying the defendant's motion for a continuance after Mr. Benton had been substituted as counsel for Mr. Schutz. It is the contention of the appellant that such a ruling constituted a denial of the appellant's right and that the appellant, with counsel, was not able to adequately prepare his defense for trial, to be represented by counsel. However, the facts do not support such a contention. (See Statement of the Case.) Mr. Benton was originally appointed as counsel for the defendant-appellant from the Federal Indigent Panel on July 8, 1957 at which time the defendant-appellant was arraigned and made his plea. On July 9, 1957 appellant's motion to reduce bail was granted. The trial was then set for July 29, 1957. On July 22, 1957, Mr. Benton made a motion to be relieved as counsel since he felt the defendant was not an indigent. This motion was granted. At this time, Mr. Benton showed that he had a good understanding of the case and indicated that the defendant was preparing a substantial defense. He further indicated that the defendant had retained other counsel, Mr.

Schutz. The defendant was arraigned on a superseding indictment on the 29th day of July at which time Mr. Schutz appeared and the two indictments were set for trial on August 13, 1957. Both indictments arose out of the same fact situation.

On August 13, 1957, Mr. Schutz asked to be relieved as counsel. At this time, the defendant stated in court that he did not wish Mr. Schutz to represent him. The court then told the defendant to obtain counsel and that the matter would be continued until August 15, 1957. Mr. Schutz was present on the 15th and represented the defendant in the selection of the jury. The defendant at this time made the representation that he would like to have Mr. Benton represent him as counsel and that he had talked to Mr. Benton about this but had not actually retained him. The defendant was instructed to contact Mr. Benton and have him as counsel in the further proceedings of the trial which were continued until August 16, 1957.

On August 16, 1957, Mr. Benton's motion for a continuance was denied on the grounds that he had represented the defendant from July 8, 1957 to July 22, 1957 and should have been aware of the facts of the case sufficiently enough to make adequate representations. [R. pp. 89-94.]

The entire transcript will show that the defendant-appellant was well represented by counsel at all stages of the proceedings. He had ample opportunity to hire counsel of his own choosing prior to the date of trial and even after the original trial date, the matter was extended to give the defendant more time to prepare adequately for trial. That he did not act in good faith in

procuring counsel is shown by the record. The fact that he had ample opportunity to employ counsel is sufficient. [See Court's Statement, R. p. 397.]

A leading case which is very similar to the present fact situation is *Neufield v. United States,* 1941, 118 F. 2d 375, 73 App. D. C. 174, *cert. den.,* 315 U. S. 798, 62 S. Ct. 580, 86 L. Ed. 1199. Among other things, it holds the following: The granting or refusal of a continuance is a matter of discretion of the judge to whom application is made; Such a ruling will not be reversed except for abuse of discretion; The fact standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to "assistance of counsel"; A party seeking a continuance must make a showing that a continuance is reasonably necessary for a just determination of the cause; and if a continuance is sought for purpose of securing attendance of witnesses, it must be shown who they are, what their testimony would be, that it would be relevant and competent, that witnesses can probably be obtained if continuance is granted, and that due diligence has been used to obtain attendance at the trial as set; An accused aware of his right to counsel and able to obtain counsel himself cannot over an extended time omit to take any steps towards retaining counsel for trial proper and cannot properly complain if trial court, on morning when case was called for trial, appoints counsel who had been previously retained for reduction of bond. See also: *Avery v. Alabama,* 1940, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377; *Isaacs v. United States,* 1895, 159 U. S. 487, 16 S. Ct. 51, 40 L. Ed. 229; *Tomlinson v. United States,* 1937, 68 App. D. C. 106, 93 F. 2d 652, *cert. den.* 1938, 303 U. S. 646, 58 S. Ct. 645, 82 L. Ed. 1107.

D.

Contradictory Counts.

That the two indictments (counts) are contradictory and mutually exclusive, thereby making it impossible to defend to both indictments (counts) at the same time.

It is submitted that the test for determining whether or not a pleading is proper is based upon common law principles and which are set forth in the Sixth Amendment to the Constitution: the defendant shall be informed of the nature and cause of the accusation. The courts have established two principles by which these questions may be decided: one, is the pleading certain enough so that the defendant may plead jeopardy if a subsequent indictment is filed; two, is the pleading certain enough to enable the defendant to prepare his defense. *Rosen v. United States,* 161 U. S. 30, 16 S. Ct. 434, 480, 40 L. Ed. 606; *United States v. Aviles,* D. C. Cal. 1915, 222 F. 474; *United States v. Allied Chemical and Dye Corp.,* D. C. N. Y. 1941, 42 F. Supp. 425; *White v. United States,* C. C. A. Okla. 1933, 67 F. 2d 71; *United States v. Potter,* C. C. Mass. 1892, 56 F. 83, reversed on other grounds 155 U. S. 438, 15 S. Ct. 144.

To satisfy this test, each count must be examined by itself to see if it is certain enough to meet the above requirements. Each count of the indictment stated with specificity the charge and the facts leading to the charge so that the defendant was apprised of the nature of the accusation. The dates, places, persons and acts involved were all set forth so that the defendant could not be placed in jeopardy by a subsequent indictment, and were certain enough to permit the defendant to prepare his defense. Both counts arose out of closely connected acts,

or facts which showed acts within a limited time and space. Even though count two alleged facts contained within count one, each count within itself meets the above requirements of certainty.

The court properly instructed the jury that the defendant may not be convicted of both counts but only upon one or the other or neither. [Rep. Tr. p. 373, lines 18-24.]

Conclusion.

We submit that the trial court committed no error in that the evidence was sufficient to find a violation of the law as charged; that no illegal evidence was admitted which affected the rights of the appellant; that the denial of the motion for continuance by counsel on August 16, 1957 was proper and did not violate the appellant's right to assistance of counsel; that the indictment was definite and certain as to each separate count thereby enabling the appellant to be apprised of the charge and that it was stated with certainty and definiteness so that no danger of a second indictment could be urged on the same alleged facts.

Respectfully submitted,

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